

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**CITIZENS UTILITY BOARD,
CITIZENS ACTION/ILLINOIS AND
AARP**

-VS-

**ILLINOIS ENERGY SAVINGS CORP.
D/B/A U.S. ENERGY SAVINGS CORP.**

**COMPLAINT PURSUANT TO
220 ILCS 5/19-110 OR 19-115.**

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DOCKET NO. 08-0175

**COMPLAINANTS' RESPONSE TO USESC'S
MOTION TO DISMISS SECTIONS V, VI AND VII OF THE COMPLAINT**

I. USESC's Motion Is Fundamentally Flawed.

Energy Savings Corp. d/b/a U.S. Energy Savings Corp. (USESC), has requested this Commission to dismiss three portions of the Complaint. The motion should be denied for several reasons:

- The “claims” that USESC seek to dismiss do not request any remedies but rather simply state that certain actions by USESC are in violation of other statutes, therefore there is nothing to “dismiss.”
- USESC in its Motion ignores the relevant statute—The Alternative Gas Supplier Law, 220 ILCS 5/19-100 *et seq.*—and instead relies on interpretations of the Universal Telephone Service Protection Law, 220 ILCS 5/13-100 *et seq.*, which has no bearing on this Complaint.
- USESC's Motion ignores Section 4-601 of the Public Utilities Act, 220 ILCS 5/4-601 that allows for concurrent jurisdiction by the Commission under Illinois consumer protection laws.

Because of these fundamental flaws in USESC's motion, it must be denied.

II. The Complaint Does Not Request Any Independent Remedy Under Sections V, VI or VII.

The Citizens Utility Board, Citizen Action/Illinois and AARP (collectively, CUB) filed a Verified Complaint on March 3, 2008 (Complaint) alleging that the actions and practices of USESC violated the Alternative Gas Supplier Law, the Commission's own rules and regulations and consumer protection laws. As a result of these actions, CUB requested the Commission, pursuant to its authority under the Alternative Gas Supplier Law, 220 ILCS 5/19-100 and 19-115, to order USESC to cease and desist its unlawful practices, to impose financial penalties on USESC and to alter, revoke or suspend USESC's certificate of service.

At Parts V, VI and VII, the Complaint alleges violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 (DBPA); the Illinois Deceptive Trade Practices Act, 815 ILCS 510/2l (DTPA); and violation of the prohibition against unreasonable liquidated damages. The Complaint does not request any independent remedies as a result of these violations but rather they are included to demonstrate the magnitude of the violations of law by USESC. Thus, the issue as to whether the Commission has the authority to "adjudicate" the claims, as made by USESC in its Motion, is not raised by the Complaint.

Even if the Complaint sought independent remedies under sections V, VI and VII of the Complaint, USESC in its Motion fails to demonstrate that the Commission lacks jurisdiction to adjudicate such matters.

III. USESC Relies On The Wrong Statute For Relief.

USESC relies heavily on *Wernikoff v. RCN Telecom Svcs. of Illinois, Inc.*, 341 Ill. App. 3d 89 (2nd Dist. 2003) to support its argument. USESC's reliance is flawed for several reasons. First, *Wernikoff* concerned the issue of whether by charging higher rates, there was a violation of

the DBPA that required refunds from the competitive telecommunications provider. In this case, the Complaint does not seek a refund in the difference in price but rather seeks penalties and revocation of USESC's certificate to operate in the state. Second, the court's analysis in *Wernikoff* was based on the interpretation of the Universal Telephone Service Protection Law, 220 ILCS 5/13-100 *et seq.* The Appellate Court provides no analysis of the Alternative Gas Supplier Law, 220 ILCS 5/19-100 *et seq.*, that is at issue in this Docket. In fact, all of the cases cited by USESC in its Motion concern the application of the Telephone Protection law, not the Alternative Gas Supplier Law.

A. Gas Supplier Law grants the Commission the authority to hear consumer law complaints.

The Gas Supplier Law authorizes the Commission to certify alternative gas suppliers such as USESC. Under the Gas Supplier Law, USESC had to certify to the Commission that "the applicant will comply with all other applicable laws and rules." 220 ILCS 5/19-110(e)(5). Once certification was granted by the Commission, USESC was required to "continue to comply with the requirements for certification stated in Section 19-110." 220 ILCS 5/19-115(b)(2). One of the requirements is that USESC comply with all other applicable laws and rules. Two of the laws applicable to USESC are the DBPA and the DTPA. Under the Gas Supplier Act, the Commission has jurisdiction to "entertain and dispose of any complaint against any alternative gas supplier" which has violated or is in non-compliance "with any applicable provisions of Section 19-110 or Section 19-115." 220 ILCS 5/19-120(b)(1). Under both Section 19-110 and Section 19-115 is the requirement that USESC comply with all other applicable laws and rules.

USESC fails to cite or address in its Motion the provisions contained in Sections 19-110 or 19-115 of the Gas Supplier Law. This omission is fatal to USESC's motion and cannot be explained away.

B. 'Reservation of rights' does not prohibit Commission from entertaining consumer law complaints.

USESC is in error in its interpretation of Section 120(d) of the Gas Supplier Law. USESC states that the section is a "reservation of rights" for the Attorney General that bars this Commission from investigating any issue that might fall under the DBPA. This interpretation is inconsistent with the not only other provisions of the Gas Supplier Act but also the Public Utilities Act, 220 ILCS 5/4-601.

Under Section 120(b) of the Gas Supplier Act, the Commission "shall have jurisdiction" to "entertain and dispose of any complaint against any alternative gas supplier" that alleges a violation of any applicable laws or rules. As noted above, two of the applicable laws are the DBPA and the DTPA. Section 120(d) does not restrict the Commission's jurisdiction regarding these two statutes but merely provides that the Commission's action under the DBPA does not "limit, restrict, or mitigate" the powers of the Attorney General. This provision would not be necessary if the Act intended to restrict the Commission's jurisdiction under the DBPA.

C. Commission's authority to require USESC to use marketing materials that are not deceptive is consistent with Commission's authority to hear consumer law based complaints.

Further, under Section 19-115(c), USESC is required to comply with certain requirements pertaining to the marketing, offering and providing of services including:

- (1) Any marketing materials which make statements concerning prices, terms, and conditions of service shall contain information that adequately discloses the prices, terms and conditions of the products or services.
- (2) Before any customer is switched from another supplier, the alternative gas supplier shall give the customer written information that adequately discloses, in plain language, the prices, terms, and conditions of the products and services being offered and sold to the customer.

220 ILCS 5/19-115(f)(1)-(2). An investigation and hearing into these requirements would include the issues that would be raised under the DBPA and DTPA. Thus, it would be inconsistent with judicial economy for the Commission not to have jurisdiction over these matters.

D. Public Utilities Act provides for concurrent jurisdiction of consumer law complaints with the Commission.

The fact that the Commission has the authority to entertain and dispose of complaints under the DBPA is further supported by Section 4-601 of the Public Utilities Act, 220 ILCS 5/4-601 where it specifically states that “[t]he General Assembly finds that consumer protection is vital to the health, safety, and welfare of Illinois consumers.” The section provides that “notwithstanding any other provision of law,” the Commission shall “work cooperatively” with law enforcement officials “in their enforcement of consumer protection laws, including the Consumer Fraud and Deceptive Business Practices Act.” The Commission upon written request is to forward complaints concerning violations of any consumer protection law to the Attorney General. The section also notes that “remedies for violations” of the Act “are in addition to, and not in substitution for,” remedies under the DBPA. A fair reading of this provision is that the

Public Utilities Act gives jurisdiction to the Commission over complaints arising out of consumer protection laws. If that were not the case, then the Commission would not have the ability to forward to the Attorney General complaints concerning violations of consumer protection laws since the Commission would have no way of knowing if there were violations until the Commission undertook an investigation and conducted a hearing. This is further supported by the language that states that any “remedies for violations” of consumer protection laws by the Commission “are in addition to, and not in substitution for, such other remedies.”

As a result, USESC’s interpretation of the relevant statutes is fatally flawed.

IV. USESC’s Motion Inaccurately Summarizes Liquidated Damages Section.

USESC asserts in its Motion that “Complainants allege that the liquidated damages provision in Respondent’s contracts is unconscionable, and therefore enforceable [sic].” This is an inaccurate summation of CUB’s argument. First, CUB asserts that USESC’s liquidated damage provisions should be considered a “penalty,” rather than a termination fee, under Illinois law. Complaint at 9. CUB made no assertion of conscionability, but instead pointed out that under Illinois law, USESC’s liquidated damage clause should be considered “an impermissible means to punish nonperformance.” Complaint at 9.

As noted above, in order for USESC to maintain its certification to provide service in Illinois, it must “comply with all other applicable laws and rules.” 220 ILCS 5/19-110(e)(5). If the Commission cannot determine whether USESC’s contract provisions comport with the other applicable contract laws of Illinois, it will render itself powerless in the face of unlawful contract provisions, and will significantly limit its ability to review certification.

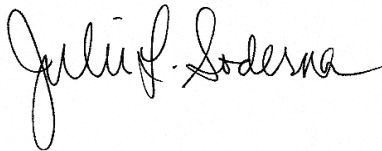
Since the Commission has the general power to determine whether “an alternative gas supplier has failed to provide service in accordance with the terms of its contract,” it follows that the Commission must have some basis from which to determine what is “in accordance with the terms of its contract.” 220 ILCS 19-120(b)(2). This determination cannot be made unless the Commission uses general common law principles or the canons of contract law in order to make such determinations. As a result, the Commission has the authority to follow equitable principle in order to determine whether USESC’s contract provisions violate its responsibilities to consumers under Sections 19-110 through 19-120 of the Act.

V. Motion to Dismiss Should Be Denied.

CUB hereby requests that USESC’s Motion to Dismiss be denied.

Respectfully submitted,


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